(2)
Supreme Court, U.S.
FILED
OCT 10 2002
CLERK

No. 02-389

In the Supreme Court of the United States

THOMAS J. QUINN,

Petitioner,

v.

JOHN SHIREY, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR COUNTY RESPONDENTS

ROGER E. FRIEDMANN
ASSISTANT PROSECUTING ATTORNEY
Counsel of Record

MICHAEL K. ALLEN
PROSECUTING ATTORNEY
OF HAMILTON CNTY, OH
230 E. NINTH STREET
SUITE 4000
CINCINNATI, OH 45202
DDN: (513) 946-3025
FAX: (513) 946-3018

Counsel for Respondents
Robert Bedinghaus, John Dowlin,
Thomas Neyer, David Krings, Hamilton County

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

13 pp

QUESTIONS PRESENTED

The Petitioner has presented the following questions as the basis for the requested review by this Court.

1. Where a public employer deprives an employee of his liberty interest under the Fourteenth Amendment by making stigmatizing and false public statements about the employee in connection with the termination of his employment, is the employer required under fundamental constitutional principles of due process to notify the employee that he is entitled to a name-clearing hearing?

2. Where an employee has been terminated from his public employment under circumstances in which his professional reputation has been stigmatized, must the employee's complaint brought pursuant to 42 U.S.C. § 1983 contain affirmative allegations that the employee specifically requested and was denied a name-clearing hearing by the employer in order to survive a motion to dismiss under Federal Civil Rule 12(b)?

CORPORATE DISCLOSURE

Disclosure of Corporate Affiliations and Financial Interests of Respondents, Bedinghaus, Neyer, Dowlin, Krings and Hamilton County

The Respondent, Hamilton County, Ohio is a political subdivision of the State of Ohio. The individual Respondents, David Krings, County Administrator and Robert Bedinghaus, Thomas Neyer and John Dowlin are County Commissioners of Hamilton County, Ohio and are governmental officials under appropriate sections of the Ohio Revised Code. To the extent that such individuals are sued in their personal, non-governmental capacities, the individuals Respondents state that they are not subsidiaries or affiliates of publically owned corporations and there is no publically owned corporation, not a party to the appellate process, that has a financial interest in the outcome.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 2

REASONS FOR DENYING THE WRIT 3

I. PETITIONER HAS NOT ADVANCED A COMPELLING ARGUMENT TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT OF HIS FIRST QUESTION 3

A. The Sixth Circuit Does Not Rely Upon the "Affirmative Duty" Advanced by Petitioner's Argument 3

B. Review Is Not Warranted Because There is No Conflict With Other Circuits. 4

II. THE SECOND QUESTION PRESENTED IS FACT SPECIFIC AND DOES NOT WARRANT REVIEW BY THIS COURT. 5

CONCLUSION 7

TABLE OF AUTHORITIES

Page

Brown v. City of Niota,
214 F.3d 718 (6th Cir. 2000) 4

Buxton v. Plant City,
871 F.2d 1037 (11th Cir. 1989) 4, 5

Gillum v. City of Kerrville,
3 F.3d 117 (5th Cir. 1993) 5

Ludwig v. Board of Trustees,
123 F.3d 404 (6th Cir. 1997) 3, 4, 5

Lyons v. Barett,
851 F.2d 406 (D.C. Cir. 1988) 4

Richardson v. Orangeburg School District No. 1,
1, 94-2092, 1995 W.L. 255941
(4th Cir. May 3, 1995) 4

Rosenstein v. City of Dallas, 876 F.2d 392,
(5th Cir. 1989) 5

Wojcik v. Massachusetts State Lottery Commission,
300 F.3d 92 (1st Cir. 2002) 5

STATEMENT OF THE CASE

The Petitioner, Thomas Quinn ("Petitioner") filed his action against Respondents the City of Cincinnati, John F. Shirey, City Manager (collectively "City Respondents") and Robert Bedinghaus, John Dowlin, Thomas Neyer, David Krings, Hamilton County, Ohio ("County Respondents"). The Petitioner alleged that all of the Respondents had deprived him of the liberty interest in his reputation without due process by terminating his employment under stigmatizing circumstances without providing a name-clearing hearing. The City Respondents moved to dismiss the Complaint on several different grounds in the District Court. The County Defendants had not joined in the Motion to Dismiss filed by the City Respondents. The District Court, Southern District of Ohio, dismissed the Petitioner's Complaint including all claims against the County Respondents. On appeal to the United States Court of Appeals for the Sixth Circuit, the Petitioner raised, for the first time, the claim that the City Respondents had breached an "affirmative duty" imposed by the Constitution to inform Petitioner of an assumed right to a name clearing hearing. The Court of Appeals for the Sixth Circuit affirmed the District Court's dismissal of the Complaint. The Sixth Circuit found that the Petitioner had not claimed that he was unaware of his right to a name-clearing hearing. (Pet.App.16a) The Sixth Circuit also ruled that the Petitioner had failed to request a name-clearing hearing. Because of the firm basis of its decision, the Sixth Circuit declined to address the alternative grounds for the dismissal presented by the City Respondents or County Respondents in their argument to the Court. (Id. at 20a)

STATEMENT OF THE FACTS

The Petitioner, Thomas Quinn, was employed by the City of Cincinnati as the Director of the Metropolitan Sewer District of Greater Cincinnati ("MSD") from 1992 until 1998. MSD is a joint operation of the City of Cincinnati and Hamilton County, Ohio. The City of Cincinnati performs the day to day management of MSD. The Board of County Commissioners retained some authority and control over MSD, including the responsibilities for adopting rules and regulations for MSD. Petitioner's job performance was under scrutiny from the Spring of 1997 until the Spring of 1998 as City and County officials made various statements concerning the Petitioner and his performance of his job duties. Such statements included accurate accounts that investigations and audits of the MSD and Petitioner's management of the MSD were occurring. Some of the "factual" statements which Petitioner has attributed to the Respondents involving Grand Jury investigations and a report concerning sewer tap-in waivers are actually attributed to newspaper reports and not to any public officials.

The Complaint that the Petitioner had filed in the District Court in this action did not allege that the audits, investigations and inquiries had not occurred nor that any public official publically stated that Petitioner was corrupt or dishonest. The Complaint did not allege that Petitioner was unaware of his "right" to a name clearing hearing or that the City respondents had failed to inform him of this assumed right. The County did not handle MSD personnel matters. As a city employee, the County respondents had no duty to the Petitioner to conduct any name clearing hearing.

On April 28, 1998 the City Manager informed the Petitioner that he would be discharged if he did not resign the

next morning. The Petitioner did in fact resign the next day without requesting any name clearing hearing.

REASONS FOR DENYING THE WRIT

I. PETITIONER HAS NOT ADVANCED A COMPELLING ARGUMENT TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT OF HIS FIRST QUESTION.

A. The Sixth Circuit Does Not Rely Upon the "Affirmative Duty" Advanced By Petitioner's Argument.

In the present action the Sixth Circuit ruled that the Petitioner had failed to allege that he was unaware of his assumed right to a named-clearing hearing. Petitioner has argued that an employer should be required under constitutional principles of due process to notify an employee that he is entitled to a name-clearing hearing in connection with a termination proceeding. The Petitioner seeks to impose an affirmative constitutional duty to advise employees of their right to ask for a name-clearing hearing.

The Sixth Circuit did not decide the action based upon the "affirmative duty" theory which the Petitioner suggested is required by the Constitution. The Court simply stated the Petitioner had failed to request a name clearing hearing, which was fatal to his claim and therefore found that the District Court properly dismissed his complaint.

The Sixth Circuit, in its decision, stated that it has never imposed an affirmative duty on an employer to apprize the employee of his right to a name clearing hearing. The Court properly followed its previous decision of *Ludwig v.*

Board of Trustees, 123 F.3d 404 (6th Cir. 1997) in which the Sixth Circuit decided that Plaintiff must request and be denied a name clearing hearing in order to have been deprived of his liberty interest without due process. See also, *Brown v. City of Niota*, 214 F.3d 718 (6th Cir. 2000). The Plaintiff who fails to allege that he has requested a name clearing hearing and was denied the same has no cause of action, whether or not he had been informed of right to a hearing before filing suit.

The Sixth Circuit did not need to decide whether an "affirmative duty" existed because the allegations set forth in the Petitioner's Complaint were insufficient to state a cause of action based upon the previous decisions of the Sixth Circuit.

B. Review Is Not Warranted Because There is No Conflict With Other Circuits.

Petitioner has argued that decisions from other circuits establish a conflict among the circuits which would warrant review by this Court. The case of *Richardson v. Orangeburg School District No. 1*, 1, 94-2092, 1995 W.L. 255941 (4th Cir. May 3, 1995) involved a qualified immunity appeal by school board members where the 4th Circuit found that the defendants school board members had not afforded *Richardson* adequate due process at a school board meeting. This case does not hold that a public employer has an "affirmative duty" as asserted by the Petitioner. Likewise, *Lyons v. Barett*, 851 F.2d 406 (D.C. Cir. 1988) held that a discharged non-tenured employee had a right to a name clearing hearing. The Court did not hold that an "affirmative duty" exists to advise the employee. Further the case of *Buxton v. Plant City*, 871 F.2d 1037 (11th Cir. 1989) did not establish the broad "affirmative duty" asserted by the petition

and the Petitioner has no other decisions from the 11th Circuit that follow *Buxton*, *supra* or that support the "affirmative duty".

The Petitioner has cited several cases that he claims have rejected the "affirmative duty" argument that he is advancing before this court. Petitioner claims that the Court in *Wojcik v. Massachusetts State Lottery Commission*, 300 F.3d 92 (1st Cir. 2002) rejected the "affirmative duty" argument. The 1st Circuit simply stated that the "government must have failed to comply with employees request for adequate name-clearing opportunity." This decision says nothing about whether an "affirmative duty" to notify the employee of the right to request a name clearing hearing exists. *Id.* at 103. Likewise, the 5th Circuit decisions in *Gillum v. City of Kerrville*, F.3d 117 (5th Cir. 1993) and *Rosenstein v. City of Dallas*, 876 F.2d 392, (5th Cir. 1989) have no holding regarding the asserted "affirmative duty". The Sixth Circuit, in its decision, follows *Ludwig, supra* and specifically found that the *Rosenstein* had been distinguished in the *Ludwig* decision. (Pet. App. at 18a).

There is no real conflict among the federal circuits concerning the claimed "affirmative duty" as outlined by the Petitioner in his petition.

II. THE SECOND QUESTION PRESENTED IS FACT SPECIFIC AND DOES NOT WARRANT REVIEW BY THIS COURT.

Petitioner asks that this Court review the Sixth Circuits decision on facts specific to the Complaint filed by the Petitioner with the District Court. The Sixth Circuit ruled:

> "Even accepting the allegation in Plaintiff's complaint as true and construing them in his favor, we do not see how Defendants could be required to interpret Plaintiff's request to keep his job until pending investigations concluded as being tantamount to a request for a name clearing hearing."

(Pet. App. 18a-19a)

The Sixth Circuit based its decision on the particular allegations of the Complaint filed by the Petitioner, Quinn. The Petitioner did not sufficiently apprize his employer, the City of Cincinnati, of his desire for a name-clearing hearing. The Sixth Circuit's decision is logical and concise. The Sixth Circuit has suggested that the exact words "name-clearing" hearing are not necessary. However, on the facts specific to this case it is clear that the Petitioner had not sought the name-clearing hearing in any specific manner.

The Sixth Circuit's ruling that the Petitioner's allegations were insufficient does not present an important question warranting this Court's review. In the present case, John Shirey, as the representative of the City of Cincinnati, the employer of Thomas Quinn, made a decision that he was going to terminate Mr. Quinn. Mr. Quinn asked that he not be discharged until certain investigations had been concluded. No reasonable public official confronted with the request not to discharge a public employee would interpret this as a request for any sort of hearing much less a name-clearing hearing. It easily can be presumed that the Petitioner resigned to avoid further public scrutiny of the events that were than under investigation. The Petitioner might reasonably argue that the City officials would know that Petitioner desired to keep his position of employment. It is not reasonable to

impose a duty upon them to divine the intention of the Petitioner that he sought to have a name clearing hearing.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROGER E. FRIEDMANN, 0009874
ASSISTANT PROSECUTING
ATTORNEY
Counsel of Record

Michael K. Allen
Prosecuting Attorney
Hamilton County, Ohio
230 E. Ninth Street, Suite 4000
Cincinnati, Ohio 45202
DDN: (513) 946-3025
FAX: (513) 946-3018

COUNSEL FOR COUNTY
RESPONDENTS,
ROBERT BEDINGHAUS,
JOHN DOWLIN, THOMAS
NEYER, DAVID KRINGS AND
HAMILTON COUNTY